LIBRARY
SUPREME COURT, U. S.

No. 1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

EDWARD BENNETT WILLIAMS,
AGNES A. NEILL,
1000 Hill Building
Washington 6, D. C.

MORRIS SHILENSKY,
120 Broadway,
New York 5, New York,

Counsel for Petitioner.

HAYS, ST. JOHN, ABRAMSON & HEILBRON,
120 Broadway,
New York 5, New York,

Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1047

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

This petition for rehearing is based upon an extraordinary statement contained in the Solicitor's brief in opposition to certiorari, which petitioner had no opportunity to answer.

At page 12 of his brief, the Solicitor stated:

> "It is recognized, however, that knowledge of the existence of a practice of special inspection of the tax returns of potential jurors raises the possibility that some persons might wish to avoid jury service in the thought that they might thereby avoid some inconvenience or prejudice as taxpayers. To avoid any possible problems in this respect in future cases, *United States Attorneys are being instructed not to engage in this practice*. Thus, in so far as the action involved in the instant case might be deemed potentially productive of problems in other

cases, those problems are being obviated." (Emphasis added.)

Although the brief in opposition was not due until July 5, 1958, it was filed on June 25 and petitioner's counsel received copies thereof on June 26. Certiorari was denied on June 30. Petitioner had no prior knowledge that inspection of prospective jurors' tax returns was being outlawed in future cases. Consequently, he had no opportunity to file a reply brief dealing with this important matter.

The Solicitor has virtually conceded that the inspection of prospective jurors' tax returns by the prosecution is inconsistent with the proper administration of criminal justice. This concession is completely contrary to the opinion of the court below, which dismissed as "far-fetched bogies" the suggestion that such inspection would discourage jury service and intimidate jurors in the exercise of their functions. It is likewise contrary to the position of the United States Attorney, who stated in the court below that the government "would be remiss in its duty" if it did not inspect the jurors' returns.[1]

Of course, the present Solicitor cannot commit any future Attorney General or Solicitor General to disregard the plain holding of the court below that this practice is entirely legal. If the next Attorney Gen-

[1] At page 51 of his brief in the Court of Appeals, the United States Attorney stated:

> "The Government sought information from all available sources, one of which was the tax returns of some of the prospective jurors. There can be nothing improper in the inspection of the tax returns for this purpose. Indeed, the Government would be remiss in its duty if it did not consider all legally available information."

eral agrees with the United States Attorney who prosecuted this case that it is the prosecution's "duty" to inspect prospective jurors' returns, the practice will undoubtedly be resumed. The decision of the court below will stand as a bulwark against attacks upon its legality and constitutionality.

Moreover, the Solicitor's promise to protect the rights of future defendants does not protect the rights of this defendant. The Solicitor seeks to avoid this obvious principle by suggesting that inspection of prospective jurors' returns does not violate a defendant's rights unless the jurors are aware of the inspection and hence influenced by it.

The coercive effect of such awareness, however, is but one of the reasons why inspection is unlawful. A defendant is entitled to something more than an impartial jury. Certainly a jury may be completely impartial although negroes, women, or daily wage earners have been excluded from the panel, but a defendant convicted by such a jury is admittedly entitled to a new trial. The same result must obtain if jurors are excused contrary to law. If, for example, the trial judge excused for cause all members of the defendant's racial group, or if he doubled the number of peremptory challenges allowed to the government without the defendant's consent, no resultant conviction could stand. If the government uses illegally obtained information in classifying members of the jury panel and exercises its peremptory challenges on the basis of such classification, like considerations should invalidate a resultant conviction.[2] It can make little difference to the de-

[2] By administrative regulations having the force of law, inspection of income tax returns without a duly signed written request is forbidden. Treasury Regulations 111, Secs. 4630.34, 4631.4,

fendant whether the government violates the law in selecting the jury panel or in selecting the actual jurors.

This is thus a serious conflict between the Solicitor and the Court of Appeals for the Second Circuit as to what the law is on this subject and as to how the government should conduct itself in this important phase of criminal trials. This conflict, it appears to us, points out the importance of the first question raised in the petition for certiorari.

We respectfully pray that the Court rehear the application for a writ of certiorari limited to the first question, namely, whether the prosecution may classify prospective jurors on the basis of information derived from their federal income tax returns and use such classification as a basis for exercising its peremptory challenges.

EDWARD BENNETT WILLIAMS,
MORRIS SHILENSKY,
AGNES A. NEILL,
Counsel for Petitioner.

July, 1958.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is confined to intervening circumstances of substantial and controlling effect.

EDWARD BENNETT WILLIAMS

463D.5. Admittedly there was no proper written request in this case. There is hence no necessity to determine whether Congress could constitutionally permit the prosecution to inspect the returns of prospective jurors.